SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 353

HERBERT CHARLES PETLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
(28 U.S.C. §1254(1))

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(28 U.S.C. §1254(1))

The Petitioner Herbert Charles Petley respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 5, 1970.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on June 5, 1970, and this Petition for Certiorari is filed within thirty (30) days

of said date, no petition for rehearing having been filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the due process clause of the Fifth Amendment to the United States Constitution requires reversal of petitioner's conviction where the jury was given an instruction containing the presumption authorized by 21 U.S.C. §176a and condemned as unconstitutional in *Leary v. United States*, 395 U.S. 6, 52.

2. Whether petitioner's conviction was obtained by or rests upon evidence which offends the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution.

Statutory Provisions Involved.

United States Code, Title 21

§176a reads, in pertinent part, as follows:

". . . whoever, knowingly, with intent to defraud the United States . . . receives, conceals . . . or in any manner facilitates the transportation [or] concealment . . . of . . . marijuana after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five nor more than twenty years, and in addition, may be fined not more than $20,000."

* * *

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such posses-

sion shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Statement of the Case.

Petitioner was charged by a one count indictment filed in the United States District Court for the Central District of California with violation of 21 U.S.C. §176a, that is, concealment and transportation of marijuana after illegal importation.[1] He pleaded not guilty, and the cause was transferred to Hon. Irving Hill, Judge of said court, for trial.

A defense motion to suppress a tobacco pipe as illegally seized evidence was heard prior to trial and denied.

Thereafter, the indictment came on for trial before a jury. On October 21, 1968, the jury returned a general verdict of guilty as charged.

On November 19, 1968, petitioner was sentenced by said court to prison for a term of 5 years and 6 months.

Petitioner filed a Notice of Appeal on November 19, 1968. The United States Court of Appeals affirmed petitioner's conviction and judgment in a memorandum opinion filed on June 5, 1970.

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[1]The indictment alleged:

"On or about June 27, 1968, in Los Angeles County . . . defendant Herbert Charles Pettley (sic), with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 8.3 pounds of refined mariiuana (hashish), which said marijuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law."

Jurisdiction of the District Court to try said offense was derived from 18 U.S.C.A. §3231 and from Rule 18 of the Federal Rules of Criminal Procedure.

Jurisdiction of the Court of Appeals for the Ninth Circuit to hear and determine petitioner's appeal was founded on 28 U.S.C. §1291, §1294(1).

The evidence adduced at trial may be summarized as follows:

On May 26, 1968, petitioner and his wife left Los Angeles by air on a trip which took them to India, Tokyo, Honolulu and back to Los Angeles. They arrived in Honolulu on June 25, and discovered that their luggage had been removed from their Tokyo flight because of weight and volume problems. They went through Customs, and registered at the International Inn.

During that afternoon, Mrs. Petley made several phone inquiries concerning the status of their baggage and customs procedures. In a final call, Mrs. Petley requested that their baggage be forwarded to Los Angeles. Petitioner and his wife then left Honolulu on a midnight flight without their luggage.

When the Petley baggage arrived in Honolulu, it was removed from the plane and left for approximately 45 minutes in an unenclosed, unguarded area where unauthorized persons were often seen.

Subsequently, the baggage was placed in bond and forwarded on to Los Angeles where it arrived on June 27, 1968.

That evening, petitioner went to the Los Angeles International Airport to claim his baggage. Five bags were removed from the bonded baggage room (which

is maintained under the control of Customs), and placed on the counter for inspection. Petitioner identified all five bags as his.

The last bag to be inspected was a Navy-type duffel bag which appeared to be neatly packed. The contents thereof, including several pipes, were removed and laid aside. One of the pipes, a Sherlock Holmes briar, was later found to have "a heavy residue of marijuana resin" and marijuana seed type fragments.

The pipe was admitted in evidence over defense objections that it was irrelevant.

Two-thirds of the way into the bag, the Customs Inspector removed some brocaded material which was wrapped around a plastic bag containing hashish. As the material was being unfolded, petitioner remarked that he had never seen it before.

Near the bottom of the bag was a lady's housecoat wrapped around a burlap sack within which was another plastic bag containing hashish.

After being advised of his constitutional rights, petitioner admitted that the housecoat and brocaded material were owned by him and his wife. Asked what he smoked in the pipe, petitioner is alleged to have said: "tobacco."

At trial, petitioner was the only defense witness. He testified, *inter alia*, that he had received the pipe as a gift from an American student in Bombay, and denied having ever smoked it. He also denied any knowledge that the hashish was in the duffle bag.

In its instructions to the jury at the close of trial, the District Court gave, over defense objections timely

made and preserved, the presumption contained in 21 U.S.C. §176a.

On appeal, the Ninth Circuit, while conceding that such instructions had been declared unconstitutional in *Leary v. United States*, 395 U.S. 6 (1969), nevertheless held the instruction was harmless under the authority of *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

The Court of Appeals below also determined that petitioner was not convicted of an uncharged offense [*i.e.*, importation or smuggling],[2] concluding that by merely claiming the bag at Los Angeles Airport he *facilitated* the transportation of the hashish.

The Court below further found that petitioner's failure to declare orally or in writing his possession of the hashish, as required by 19 U.S.C. §1497, was "clearly proof of importation 'contrary to law.' "

Finally, the Ninth Circuit ruled that petitioner exercised sufficient dominion and control over the bag to constitute proof of possession, "even though the duffle bag was in the 'protective custody' of the airline from Honolulu to Los Angeles", and could not be released from control of Los Angeles Customs until inspected and cleared.

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[2]Although not charged in the indictment at bar, 21 U.S.C. §176a also punishes "whoever, knowingly, . . . imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced."

REASONS FOR GRANTING CERTIORARI.

1. The Opinion of the Court of Appeals for the Ninth Circuit Is in Direct Conflict With Leary v. United States, 395 U.S. 6.

Conceding that it was error for the trial court to give the instruction incorporating the statutory presumption condemned in *Leary v. United States*, 395 U.S. 6, at p. 52, the Court of Appeals below, relying on *Harrington v. California*, 395 U.S. 250 (1969) and *Chapman v. California*, 386 U.S. 18 (1967), held such error was harmless beyond a reasonable doubt.

This view of *Leary* clashes with the holding therein that . . .

> ". . . When a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories *requires* that the conviction be set aside." (*Leary v. United States, supra*, 395 U.S. at pp. 31-32) (Emphasis supplied).

Significantly, that quote is made in the context of a record similar to the one at bar. Thus, Leary was found in possession of marijuana on his re-entry from Mexico, while petitioner was found in possession of hashish on returning from India.

The unconstitutional presumption instruction was addressed to Count II of the *Leary* indictment which charged him with violating the *concealment* and *transportation provisions of 176a* (as distinguished from the smuggling provisions which were dismissed by the trial court). The indictment at bar charged petitioner with those violations, plus *receiving*.

As in *Leary*, (395 U.S. at p. 31) the record at bar contains independent evidence of knowledge that the

contraband was illegally imported. But the jury could have disbelieved or disregarded such evidence, and based its verdict solely on the presumption.

Indeed, reversal seems the more compelling in this case because, unlike *Leary*, where the presumption was inferred from *admitted*, actual possession, the presumption here rested on circumstantial evidence of constructive possession.[3]

2. The Ninth Circuit so Misconstrues and Misapplies Applicable Decisions of This Court as to Call for the Exercise of the Court's Power of Supervision in the Interests of Fair and Uniform Administration of Criminal Justice in the Federal Courts.

Ever since *Stromberg v. California*, 283 U.S. 359 (1931), this Court has consistently adhered to the principle there enunciated which requires reversal of a conviction where a general verdict rests on two or more theories, at least one of which is unconstitutional (*Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Cramer v. United States*, 325 U.S. 1, 36, fn. 45 (1945); *Yates v. United States*, 354 U.S. 298, 311-312 (1957); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Street v. New York*, 394 U.S. 576, 585-586 (1969)).

In *Chapman, supra;* 386 U.S. at p. 23, this court observed that certain constitutional errors can "never be treated as harmless." And the majority in *Harrington, supra*, reaffirms this view (395 U.S. at p. 254).

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[3]Such "constructive possession" was inferred even though the bag containing the contraband was in the "protective custody" of the airline and customs, and had been since its arrival in Honolulu. (Opinion, p. 8).

But the holding of the court below that the instruction requiring reversal in *Leary* is, on this record, mere "harmless error" casts doubt and confusion as to the appropriate standard to be applied to constitutional errors which contaminate the fact-finding process.

The question is one of constitutional policy, of course, and therefore ripe for settlement by this Court under its supervisory powers. See: *Grunewald v. United States,* 353 U.S. 391, 424 (1957). But it is difficult to see how an unconstitutional instruction to a jury could not but vitiate its verdict. For an appellate court to write such error off as harmless in effect substitutes its judgment for the jury's—or at best, second guesses the jury.

The Sixth Amendment guarantees an accused, a jury (*Duncan v. Louisiana,* 391 U.S. 145, 149 (1968); *Frank v. United States,* 395 U.S. 147, 148 (1969))—and hence, a jury's verdict, untainted by defect of constitutional magnitude and free of the necessity of appellate interpolation (*cf. Witherspoon v. Illinois,* 391 U.S. 510, 517-518, 521-523 (1968)).

These considerations would seem to justify review by this Court in the interest of the fair administration of criminal justice.

3. In Saving Petitioner's Conviction From Leary, the Opinion of the Court Below Offends Decisions of This Court Forbidding Use of Evidence Adduced From Constitutionally Protected Silence of the Accused.

21 U.S.C. §176a requires the government to prove, *inter alia,* that the accused knew that marijuana in his possession was imported "contrary to law."

The Court of Appeals' opinion here holds that knowing illegal importation of marijuana was "clearly pro[ved]" by petitioner's failure to declare his possession of it to Customs (Opinion p. 7).

Such declaration, of course, would incriminate petitioner. (See: California Health & Safety Code §§11530 and 11530.5, which declare possession of marijuana or its derivatives to be a felony-misdemeanor).

The appellate court's opinion therefore uses petitioner's failure to incriminate himself on an official government form to sustain one of the elements of the offense charged.

This result presents a unique and important issue in itself, for no case could be found where a federal appellate court used adverse inferences drawn from constitutionally protected silence in order to sustain a conviction—a conviction, incidentally, bottomed on conceded constitutional error of a trial court.

Yet, if an accused cannot be compelled to incriminate himself on a government form, or be convicted for having refused to do so (*Albertson v. Subversive Activities Control Board*, 382 U.S. 70; *Marchetti v. United States*, 390 U.S. 39; *Haynes v. United States*, 390 U.S. 85, *Leary v. United States*, 395 U.S. 6, 26-29), and if silence under the aegis of the Fifth Amendment cannot be used to obtain convictions (See: *Griffin v. California*, 380 U.S. 609, 612-615, *Malloy v. Hogan*, 378 U.S. 1, 8; *Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52, 79; *cf. Wilson v. United States*, 149 U.S. 60), it would seem to follow that the Fifth Amendment to the United States Constitution would bar a reviewing court from utilizing such omission as a basis for finding a trial court's constitutional error harmless beyond a reasonable doubt.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

HUGH R. MANES,

Attorney for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Herbert Charles Petley, Appellant, vs. United States of America, Appellee. No. 23,879.

[June 5, 1970]

Appeal from the United States District Court, Central District of California.

Before: HAMLEY and CARTER, Circuit Judge, and CROCKER,* District Judge.

JAMES M. CARTER, Circuit Judge:

Appellant was charged with knowingly receiving, concealing and facilitating the transportation and concealment of hashish (refined marihuana) which he knew had been imported into the United States contrary to law. 21 U.S.C. § 176a. He was found guilty and sentenced to five years and six months in prison. On appeal he raises the following contentions:

(1) That it was error to instruct the jury under the provisions of 21 U.S.C. § 176a;

(2) That he was convicted of a charge neither made nor proved against him, namely importation of marijuana, and that the court's instructions based on the statute were confusing, ambiguous and misleading;

(3) That there was insufficient evidence as to knowing possession of the contraband;

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*Honorable M. D. Crocker, District Judge, Eastern District of California, sitting by designation.

(4) That a briar pipe containing marihuana residue was improperly received into evidence; and

(5) That he was denied a fair trial as a result of improper cross examination.

In May 1968, appellant and his wife departed on a trip which took them to India, Japan and Hawaii before returning to Los Angeles. On or about June 25, 1968, they left Tokyo for Hawaii. Upon arrival in Honolulu the following morning they discovered that some of their baggage had not arrived. They filed a missing baggage report with the airline and then registered at the International Inn. Mrs. Petley made several calls to the airline that afternoon inquiring about the baggage. She was told that it would be coming in on a flight that evening. In a final call, Mrs. Petley requested that the baggage be forwarded on to Los Angeles. She and appellant then left Honolulu for Los Angeles on a midnight flight. When the baggage arrived in Honolulu it was bonded and sent to Los Angeles.

On June 27, 1968, appellant arrived at the Los Angeles International Airport to claim the baggage. When a customs inspector began going through the bags appellant asked why they were being inspected. The inspector told him that since the bags had been shipped in bond from Honolulu they had not gone through customs; therefore the baggage had to be inspected in Los Angeles prior to being released. One of the bags inspected was a large Navy-type duffle bag. It was about three feet tall and was neatly packed. The inspector had unpacked approximately two-thirds of the bag's contents when he found a plastic bag containing what turned out to be hashish. The plastic bag was wrapped in a white broacaded cloth, and when it was re-

moved appellant spontaneously remarked that he had never seen it before and asked what it was. At the bottom of the duffle bag was a lady's housecoat. The housecoat was wrapped around a burlap sack in which was located another plastic bag containing hashish. After being advised of his rights, appellant conceded that the brocaded cloth was owned by him and his wife. Also, when shown a briar pipe which had been removed from the duffle bag, and asked what he smoked in it, appellant replied "Tobacco." The pipe contained a heavy residue of marihuana resin.

At the trial appellant was the only witness in his behalf. He testified, *inter alia*, that the pipe had been given to him by an American he met in Bombay, and he denied ever smoking it. He also denied any knowledge that the hashish was in the duffle bag. At the close of the trial the court instructed the jury and included in its instructions the presumption contained in § 176a.

I

THE INSTRUCTION UNDER § 176a WAS HARMLESS ERROR

Appellant contends that he was denied due process, in violation of the Fifth Amendment, as a result of the court's instruction under § 176a. The court instructed the jury that illegal importation, and appellant's knowledge thereof, could be inferred from appellant's "knowing possession of the hashish."

The precise instruction was,

> "In order to find the defendant guilty in this case you must find that he had knowing possession of the hashish in question. Possession means the exercise of dominion and control."

The inference of knowledge of illegal importation under 21 U.S.C. § 176a was of course, held unconstitutional in *Leary v. United States,* 395 U.S. 6 (1969). However, an instruction containing such an inference does not necessitate a reversal in every case. As this court pointed out in *United States v. Scott,* (9 Cir. 3/6/70) .... F.2d ...., reversal is not necessary if the "instruction under the circumstances . . . was harmless beyond a reasonable doubt." *Harrington v. California,* 395 U.S. 250 (1969); *Chapman v. California,* 386 U.S. 18 (1967).

In the instant case a finding by the jury that appellant knowingly possessed the hashish would, *ipso facto,* establish appellant's knowledge of the illegal importation since it was appellant himself who was attempting to bring the hashish into the United States. Therefore, the instruction as to the inference is obviously innocuous. As we stated in *United States v. Simon,* .... F.2d .... (9 Cir. 3/30/70) "[P]roof of knowing possession, . . . establish the elements of the offense without reference to the inference. The instruction was therefore functionless, and 'harmless beyond a reasonable doubt'" See also, *Ramiro Plascencia-Plascencia v. United States,* .... F.2d .... (9 Cir. 3/25/70); *United States v. Pyle,* .... F.2d .... (9 Cir. 4/3/70); *United States v. Michael Mahoney and Charles Garcia,* .... F.2d .... (9 Cir. 5/12/70).

II

APPELLANT WAS TRIED ON THE CHARGE CONTAINED IN THE INDICTMENT AND THE COURT'S INSTRUCTIONS WERE PROPER.

Appellant also alleges a denial of due process in that he was convicted of a charge neither made nor proved. He contends that, while he was charged with receiving, concealing and facilitating the transportation and concealment of marihuana after importation, he was actually tried and convicted on the theory of smuggling. This contention is based on appellant's argument that he engaged in no conduct after importation which could be construed as receiving, concealing or facilitating. We disagree. The marihuana was illegally imported when it arrived at Honolulu International Airport, and appellant facilitated its transportation when he claimed his baggage at the Los Angeles International Airport. *Pon Wing Quong v. United States*, 111 F.2d 751 (9 Cir. 1940). Such facilitation, following the illegal importation, was sufficient to convict appellant on the charge for which he was indicted.

We next consider the proof on the allegation that the importation was contrary to law. 18 U.S.C. § 545, the section on which 176a is based, also prohibits smuggling and importation contrary to law. This court has previously considered cases concerning importations "contrary to law" from contiguous foreign countries, under both 18 U.S.C. § 545 and 21 U.S.C. § 176a. Generally reliance has been placed on Title 19, §§ 1461, 1484, 1485 and 1459 to show the importation was "contrary to law." In *Current v. United States*, (9 Cir. 1961) 287 F.2d 268, reliance was placed on

19 U.S.C. § 1461 requiring all baggage to be unladen in the presence of a customs officer and be inspected by a customs officer.

However, 19 U.S.C. § 1459 and § 1461, by their express terms are confined to merchandise imported from any "contiguous country." In our case we have an importation from Japan, so that the sections above do not pertain.

There are various sections however, which do apply to importations from foreign countries that are not contiguous. 19 U.S.C. § 1498 authorizes the Secretary of the Treasury to prescribe rules and regulations for the declaration and entry of "6. Articles carried on the person or contained in the baggage of a person arriving in the United States. . . ." Likewise, 19 U.S.C. § 1624 provides for rules and regulations pursuant to the authority contained in the above sections. The Secretary prescribed, by regulations set forth in 19 CFR § 10.19 the following: "Declaration and entry —(a) Declaration required. All articles brought into the United States by any individual shall be declared to a customs officer." 19 U.S.C. § 1496 provides for the examination of baggage to ascertain whether articles are subject to duty, duty free or prohibited, notwithstanding the fact that a declaration and entry therefor have been made. 19 U.S.C. § 1497 provides: "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if

written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture . . .". *Leiser v. United States,* (1 Cir. 1956) 234 F.2d 648, cert. denied 352 U.S. 893, considered these sections and regulations and found them applicable to importation of merchandise from a non-contiguous foreign country where there was a failure to declare.

The statutes and regulations discussed above and the *Leiser* case, show that there was sufficient proof of importation contrary to law. The records show that appellant did not declare the marihuana to the customs officers and instead inferentially tried to talk the customs officer at the Los Angeles airport out of inspecting the baggage on the ground that it had been inspected in Honolulu. Since under 19 U.S.C. § 1497, neither a written nor oral declaration was made before the examination of the baggage was begun, the marihuana was subject to forfeiture. Thus, there was clearly proof of importation "contrary to law."

Appellant also challenges certain instructions given to the jury as being confusing, ambiguous, misleading and inconsistent with the offense charged. This is in substance a continuation of appellant's earlier contention that he was tried on a charge not contained in the indictment. We find no error in the instructions. Moreover, since no objection was raised in the trial court, this claim cannot now be reached on appeal. Rule 30 F.R.Crim.P.

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.

Next appellant argues that he was deprived of due process by reason of being convicted on insufficient evidence. He specifically challenges the sufficiency of the evidence with respect to his "knowing possession" of the marihuana.

The word "possession" as used in § 176a, embraces both actual and constructive possession. *Quiles v. United States,* 344 F.2d 490 (9 Cir. 1965). In the instant case, though the duffle bag was in the "protective custody" of the airline from Honolulu to Los Angeles, appellant maintained sufficient dominion and control over the bag to constitute constructive possession. Furthermore, there is sufficient evidence in the record to support the conclusion that appellant knew the marihuana was in the bag. First, appellant owned the bag. Second, appellant was the last person known to have packed the bag. Third, there was no evidence that the bag had been tampered with in any way. Fourth, one of appellant's pipes, also found in the duffle bag, contained a residue of marihuana resin. Fifth, appellant spontaneously denied knowledge of the brocaded cloth —even prior to the discovery of the marihuana contained therein—when it was removed from the duffle bag by the inspector, but he subsequently admitted that the brocaded cloth was his and his wife's. This evidence was sufficient to support a finding of "knowing possession", and under the circumstances of this case, was also sufficient to sustain the conviction.

IV

THE PIPE WAS PROPERLY ADMITTED INTO EVIDENCE

Appellant also challenges the admission into evidence of the briar pipe. When the pipe was offered in evidence appellant objected on the ground of relevancy. The objection was overruled. Consideration of the record indicates that the trial court's ruling was a proper one. The possession of the pipe, with its marihuana residue, was clearly relevant on the issue of appellant's knowledge and intent, as circumstantial evidence tending to prove that appellant smoked marihuana and knew that the marihuana in question was in his duffle bag. In his briefs however, appellant argues that the court erred in failing to instruct the jury as to the limited purpose for which the pipe could be admitted. We find no error in this regard as appellant neither requested such a limiting instruction nor objected to its omission.

Finally appellant argues that he was deprived of a fair trial by the alleged misconduct of the government in cross-examining him. We found no such misconduct.

Affirmed.